Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Manhattan Beach
(310) 643-8448

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

2000 Pennsylvania Avenue, N.W., Suite 5300, Washington, DC 20006
Phone: (202) 785-0600 | Fax: (202) 785-1234 | www.bbklaw.com

Ontario
(909) 989-8584
Riverside
(951) 686-1450
Sacramento
(916) 325-4000
San Diego
(619) 525-1300
Walnut Creek
(925) 977-3300

Gerard Lavery Lederer
(202) 370-5304
gerard.lederer@bbklaw.com

July 16, 2018

Marlene Dortch, Secretary
Federal Communciations Commission
445 12th St SW
Washington, D.C. 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79;
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84;
Streamlining Deployment of Small Cell Infrastructure, WT Docket No. 16-421;
Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, ET Docket No. 13-84;
Accelerating Broadband Deployment, Broadband Deployment Advisory Committee, GN Docket No. 17-83

Dear Ms. Dortch:

On Friday, July 13, 2018, the undersigned and Joseph Van Eaton, both of Best Best & Krieger LLP and counsel to the Smart Communities and Special Districts Coalition, met with Thomas Johnson, General Counsel, and Ashley Boizelle, Deputy General Counsel, to discuss the above-captioned proceedings. Specifically, we discussed local government land use and permitting processes, the costs involved with same, and other land use issues, all of which are described in greater detail in the attached document.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being filed electronically in the above-captioned dockets. Please contact me if there are any issues.

Respectfully submitted,

Gerard Lavery Lederer
of BEST BEST & KRIEGER LLP

Enclosure
cc: Thomas Johnson (by email)
Ashley Boizelle (by email)

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter Of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
Streamlining Deployment of Small Cell Infrastructure	)	WT Docket No. 16-421
Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies	)	ET Docket No. 13-84
Accelerating Broadband Deployment, Broadband Deployment Advisory Committee	)	GN Docket No. 17-83

EXECUTIVE SUMMARY

Certain of the recommendations of the Broadband Deployment Advisory Commission, and filings made in the dockets above, appear based on a misunderstanding of the differences between:

- the franchising process;
- the land use approval process,
- the permitting process, and
- the leasing/licensing processes.

Some of this confusion is understandable as different jurisdictions sometimes use the same terms to describe the different authorizations that are granted in each these four, interrelated, yet distinct processes. As a matter of sound policy and in order to properly vindicate and preserve rights constitutionally and statutorily reserved to states and local governments, the Smart Communities and Special Districts Coalition[1] believe it critical that the Commission consider the differences in these processes, and the operational challenges each may involve.[2]

---

[1] The Smart Communities and Special Districts Coalition is comprised of members of the Smart Communities Siting Coalition which was originally formed to participate in the Mobilitie Petition docket (WT Docket No. 16-421), plus additional communities and special districts who have joined to participate in the FCC's 2017 Wireless and Wireline Infrastructure proceedings (WT Docket No. 17-79 and WC Docket No. 17-84, respectively). The full membership of the Smart Communities and Special Districts Coalition is as follows:

Individual members: Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; New Carrollton, MD; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Perryville, MD; Pocomoke City, MD; Poolesville, MD; Portland, OR; Rockville, MD; Rye, NY; Santa Margarita Water District (CA); Sweetwater Authority (CA); Takoma Park, MD; University Park, MD; Valley Center Municipal Water District (CA); Westminster, MD and Yuma, AZ.

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way. The Michigan Townships Association ("MTA") promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position.

Properly considered, the Commission should conclude:

- It is not appropriate to shorten the existing shot clocks, nor to expand their application;
- Nor is it appropriate to establish additional punitive enforcement measures (such as deemed granted remedies or price controls)

that are likely to be ineffective and counter-productive – even assuming the Commission had constitutional or statutory authority to impose such measures, which Smart Communities and Special Districts Coalition does not believe to be the case.

The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance. The Kitch Firm represents PROTEC, MML, MTA and Public Corporation Law Section of the State Bar of Michigan. Best Best & Krieger represents the others in the Smart Communities coalition.

[2] This filing also supplements an *ex parte* letter filed in the above-captioned proceedings following a June 28, 2018 meeting between the Wireless Telecommunications Bureau and representatives of local governments nationwide. *See Ex Parte Letter from Gerard Lavery Lederer*, WT Docket Nos. 17-79, 16-421, WC Docket No. 17-84, GN Docket No. 17-83, ET Docket No. 13-84 (June 29, 2018) ("June 29 Ex Parte").

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter Of

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
Streamlining Deployment of Small Cell Infrastructure	)	WT Docket No. 16-421
Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies	)	ET Docket No. 13-84
Accelerating Broadband Deployment, Broadband Deployment Advisory Committee	)	GN Docket No. 17-83

I. DISTINCTIONS BETWEEN FRANCHISING, LAND USE APPROVALS, PERMITTING AND LEASES/LICENSES

While the terminology may vary from place to place, and from state to state, the distinctions can be broadly summarized as follows. It is important to recognize that there are and can be overlaps between what we describe as the "land use" and other permitting processes, but there are also very practical reasons to recognize distinctions among the processes.

1. A ***"franchise"*** provides a right to occupy rights of way to engage in a quasi-public enterprise.[3] Franchises are often service-specific – the right to construct a telephone

[3] *See* McQuillin, *The Law of Municipal Corporations,* Vol. 12 § 34:2 (3d ed. 2018) ("McQuillin").

system is distinct from the right to build an electrical system, for example.[4] Franchises are typically contractual in nature, must be subject to the police power of the community, and hence are subject to applicable land use and permitting processes.[5] As a result, the franchise itself does not grant a right to occupy any particular location within the rights of way in any particular manner.[6] However, because franchising by definition involve provision of an important right – a right to access rights of way to provide certain service – it is typically subject to compensation in the form of rents, and in addition, a person seeking a franchise may be required to bear the costs associated with obtaining the franchise.[7] The Supreme Court has long recognized that state and local governments have property interests such that the Fifth Amendment is directly implicated by any legislation that purports to authorize use of public property.[8]

2. ***Land use authorizations*** are a special type of permit, that involve determination of whether a particular "use" is allowed at a particular location.[9] Land use ordinances may

---

[4] *See id.*

[5] *Id.* at § 34:88 ("Municipal power to regulate the use of the streets is not exhausted with the grant of a franchise, but continues.")

[6] *Id.* at § 34:99 ("The grant of a franchise to use streets does not preclude the municipality from requiring application for a permit to excavate the streets to lay pipes or erect poles or the like, since requiring such a permit and the payment of a reasonable fee is a proper and reasonable exercise of the police power, and does not impair the franchise right of a company to use the streets.")

[7] *See id.* at § 34:2 ("It has been stated that a governmental 'franchise' constitutes a special privilege granted by the government to particular individuals or companies to be exploited for private profit as such franchisees seek permission to use public streets or rights-of-way in order to do business with a municipality's residents, and are willing to pay a fee for this privilege.")

[8] *See City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893), *op. on rehrg.*, 149 U.S. 465 (1893); *see also United States v. 50 Acres of Land,* 469 U.S. 24 (1984); *see also Cities of Dallas and Laredo v. FCC,* 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are . . . essentially a form of rent: the price paid to rent use of the public rights-of-ways.")

[9] *See* McQuillin at Vol. 8 § 25:179.18 ("The purpose of requiring permits under a zoning law is to facilitate its enforcement by providing zoning authorities with knowledge of a contemplated use and enabling them to determine whether or not it complies with the law.")

divide a city into zones, and define what activities are permitted in what zones – an example being the distinctions between residentially zoned neighborhoods, and commercially-zoned districts.[10] A department store may be a permitted use in the latter, but prohibited absent a special exception or a variance in the former. The land use process may involve consideration of aesthetics, size, design and the like, but while it has some elements that overlap those discussed in the next section, the issues are distinct. 47 U.S.C. § 332 is primarily concerned with this process. Land use involves an exercise of the police power, and in most states, the fees associated with the land use processes are cost-based.[11]

3. ***Permitting*** may be focused on the manner in which use rights are exercised, or may be a predicate to obtaining or exercising use rights; it may involve both pre-construction, and post-construction processes.[12] Hence, if a company obtains a variance to place a commercial business in a residential area, it must also later obtain permits, such as electrical permits, construction permits and building permits that are designed to protect public safety[13] and to ensure that facilities are installed in accordance with guidelines and regulations governing construction of facilities, and (in the case of facilities along rights of way) guidelines for

[10] *Id.* at § 25:19 ("Zoning seeks to promote the public health, safety, morality and welfare by confining certain classes of buildings and uses to defined areas.")

[11] *See* McQuillin at Vol. 9 § 26:41 ("Where a permit fee is imposed pursuant to a municipality's power to regulate, the amount of the fee may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity.")

[12] *See* McQuillin Vol. 9A § 26:224 ("Statutes and ordinances may impose requirements and conditions antecedent to the issuance of building permits, and substantial compliance with those requirements or conditions is essential to the grant of the permit.")

[13] *See* Comments of the Smart Communities and Special Districts Coalition, WT Docket No. 17-79, Exhibit 4, Report and Declaration of Stephen M. Puuri, at 3-4 (Jun. 15, 2018) ("Smart Communities & Special Districts Wireless Comments").

roadway design.[14] There may be pre-construction requirements such as "Miss Utility" with which a permittee must comply. There are oft times also post-construction requirements that must be documented before a facility can be used. For instance, it may be necessary to inspect completed work for compliance with approved plans so that subsequent users of the rights-of-way know exactly where infrastructure was built, not just planned.[15] The significance of pre and post-construction inspection is illustrated by the Malibu Canyon fire in California, caused when DAS facilities were installed without prior authorization, and installed in a manner that was not compliant with applicable codes.[16] Permitting also involves an exercise of the police power, and localities are typically limited to recovering costs associated with the process.[17]

---

[14] *See id* at Exhibit 1, Declaration of Andrew Afflerbach, at 12-14 (Jun. 15, 2018) ("Afflerbach Declaration"); *see also id.* at Exhibit 1A at 9-10 (detailing items and issues which require review in the permitting process.)

[15] *See* McQuillin Vol. 9A § 26:224 ("A permit may authorize inspection before or after its granting.")

[16] Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, The Malibu Times (Sep. 19, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html ("Under the settlement, Edison and NextG admit that one of the failed power poles was overloaded with NextG telecommunications equipment when the fire started, in violation of CPUC rules, and that Edison did not act to prevent the overloading."); *see also Decision Conditionally Approving the NextG Settlement Agreement*, California Public Utilities Commission Investigation No. 09-01-018 (Sept. 19, 2013) *available at* http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K059/77059441.PDF.

[17] *See* McQuillin at Vol. 9 § 26:41 ("Where a permit fee is imposed pursuant to a municipality's power to regulate, the amount of the fee may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity."); *see also e.g. Mobile Sign Inc. v. Town of Brookhaven,* 670 F. Supp. 68 (E.D. N.Y. 1987); *County of Orange v. Barratt American, Inc.*, 150 Cal. App. 4th 420, 58 Cal. Rptr. 3d 542 (4th Dist. 2007); *Bellsouth Telecommunications, Inc. v. Cobb County*, 277 Ga. 314, 588 S.E.2d 704 (2003); *Potts Const. Co. v. North Kootenai Water Dist.*, 141 Idaho 678, 116 P.3d 8 (2005); *Allen v. City of Hammond*, 879 N.E.2d 644 (Ind. Ct. App. 2008); *Billy Oil Co., Inc. v. Board of County Com'rs of Leavenworth County*, 240 Kan. 702, 732 P.2d 737 (1987); *Mayor and City Council of Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 586 A.2d 816 (1991); *State v. Northern Raceway Corp.*, 381 N.W.2d 526 (Minn. Ct. App. 1986); *Ashworth v. City of Moberly*, 53 S.W.3d 564 (Mo. Ct. App. W.D. 2001); *City of Great Falls v. M.K. Enterprises, Inc.*, 225 Mont. 292, 732 P.2d 413 (1987); *Orange and Rockland Utilities, Inc. v. Town of Clarkstown*, 80 A.D.2d 846, 444 N.Y.S.2d 670 (2d Dep't 1981);

4. What we refer to as ***licensing and leasing*** are the contracts or authorizations that permit an entity to use publicly owned or controlled structures such as buildings, street lights, street furniture, traditional poles and traffic signals. In granting such leases or licenses, a municipality exercises its proprietary authority as a landlord rather than on its police powers as it did in making permitting or land use decisions.[18]

Just as a landlord must look to maximize the use of its facilities, a locality considering whether to lease a light standard might first consider its future needs such as the ability to use the light pole in other ways: to monitor traffic flows; to monitor underground and roadway conditions; to monitor sounds (See e.g. "Shot spotter" which may prove critical in responding to active shooters); to provide public WiFi; and most importantly, to provide cost-effective and safe lighting.

Compensation for a license or lease permission is in the form of rents. Rents can be provided in terms of monetary compensation, in kind benefits or some combination of the two. It is also important to note that recovery of a rent or value may be required under the anti-gifting prohibitions found in a number of state constitutions as well as city or county charters.[19] While the Smart Communities and Special Districts Coalition believes that the Commission lacks the

---

Teamster's Housing, Inc. v. City of East Cleveland, 36 Ohio App. 3d 83, 521 N.E.2d 4 (8th Dist. Cuyahoga County 1987); *City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322 (Tex. App. Houston 14th Dist. 1994).

[18] *See American Airlines v. Dept. of Transp.,* 202 F.3d 788, 810 (5th Cir. 2000) ("…case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate.")

[19] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). For a fuller discussion of these anti-gifting laws see Smart Communities & Special Districts Wireless Comments at 62-64; *see also* Comments of the Texas Municipal League, WT Docket No. 17-79, at 1 (Jul. 17, 2017) ("The Texas Constitution, in Article III, Section 52, prohibits the Texas legislature from giving away the use of municipal property for less than fair market value.")

statutory authority to regulate prices for, or access to, a local government's facilities[20] – even if such actions were not otherwise precluded – the Commission should refrain from taking such actions on policy grounds.[21] Localities leverage the use of their property to create funds dedicated to, or obtain in-kind services that, serve to reduced health and safety risks, as well as deploy innovative technologies while closing the digital divide.[22]

II. UNDERSTANDING PERMITTING COSTS THAT LOCALITIES INCUR AND MUST RECOVER ARE SEPARATE FROM RENT.

Permitting fees, including those for wireless facilities, are intended to recover local government costs, both those incurred administratively throughout all permitting processes, and those incurred due to the need for expertise and consultants required by particular types of permits.[23] The basis for these costs, and the numerous steps in which they are imposed, is

---

[20] *See* Smart Communities & Special Districts Wireless Comments at 62-64.

[21] *See id.* at 65-69.

[22] Example of both of these techniques in the small cell arena were recently announced. The City of Los Angeles, a Smart Communities & Special Districts Coalition member, chose to make poles available to Verizon in exchange for "Smart Community" services. *See* June 29 Ex Parte at 2 ("Charles Small of the City Los Angeles explained the recent small cell agreement entered into by the City with Verizon and the need for any FCC action to protect such creative solutions that lead to the expedited deployment of small cells in exchange for "smart community" services being made available to the community.") The City of San Jose concluded agreements with multiple providers, and will use the proceeds of its rents to fund digital inclusion efforts. *See* Remarks of Commissioner Jessica Rosenworcel at the united States Conference of Mayors (Jun. 9, 2018), *available at* https://docs.fcc.gov/public/attachments/DOC-351482A1.pdf.

[23] Permitting evaluation can require expertise in wireless engineering, excavation, historical and environmental review, archaeology, and traffic and road safety, in addition to general administrative and construction review experience. *See* Smart Communities & Special Districts Wireless Comments, Exhibit 1A at 9-10; *see also id.* at Exhibit 2, The Economics of Local Government Right of Way Fees, Declaration of Dr. Kevin E. Cahill, Ph.D, at 8-9 ("Cahill Declaration"); *see also See* McQuillin at Vol. 9 § 26:41 ("Where a permit fee is imposed pursuant to a municipality's power to regulate, the amount of the fee may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity.")

detailed below.[24] Still, it is important to note that localities are working to streamline and simplify all elements of the land use and the permitting process, so that all applicants are treated fairly, as required by law, while maintaining the aesthetic integrity and safety of a community in furtherance of their obligations to the public.[25] An example of creative and cooperative local government response is the concierge permitting services described below.

Permitting fees are wholly distinct from rents or franchise fees paid for property access. Just as permitting is distinct from the grant of right to occupy property, the costs incurred and fees paid for the permission to participate in the activity are separate and distinct from the right to use and occupy the public space, and must be recognized as such.

A. Permitting Costs Accrue Throughout the Process

Local permitting and land use processes generate costs at all stages. The initial receipt of the application and its review, as well as any subsequent review of an incomplete application,

[24] The land use issues presented by different placements in different locations are distinct – and receiving applications *en masse* does not make consideration of relevant issues faster or easier. It is therefore important to note that batch applications for permits for new small cell networks in the rights-of-way will not necessarily simplify the process of permitting – and could in fact, add to the burdens of local government. The reason for this conclusion is that at each deployment location requested, a local government must consider factors including how construction must be managed to prevent interference with other uses of the rights of way; how construction may affect other infrastructure; and whether planned facilities may interfere with pedestrian access or impede Americans with Disabilities Act compliance. Because roadway design can vary dramatically throughout a community, permit conditions and facility design and placement may also need to be adjusted. While batch applications may offer some economies, (for example, it may be possible that if the same electrical design is used at every location, the electrical permitting process can be simplified) such economies are not as readily apparent as one might assume. In addition, a network installation may involve requests for placement of towers on streets where existing utilities are underground, placement of new poles along streets where there are existing poles (adding to street clutter), and placement of small cells on existing utility poles in commercial, residential and industrial areas.

[25] *See, e.g. Ex Parte Letter from Gerard Lavery Lederer,* WT Docket No. 17-79 (Mar. 14, 2018) ("Myrtle Beach, SC Ex Parte") (describing the approach the City of Myrtle Beach shared with Commissioner Clyburn.)

generates expenses for the local government that must be recovered. Costs are generated by construction inspections, which take place, depending on the size of a project, before, during and after any permitted activity (excavation or building). Every time a locality is required by the Commission or another authority to expedite review, additional costs are added due to the need for increased staffing and expertise. And unlike traditional building or excavation permits, local governments must develop unique forms for wireless facilities permitting, because the Commission had essentially created a system that is not iterative and cooperative, but instead penalizes a locality that does not request everything it might need in the initial application (since an application is only "incomplete" to the extent it omits information requested by the community.)[26]

Should a permit request raise zoning and land use issues, the additional costs associated with the hearing and, if necessary, an appeals process must also be recovered.

B. Shot Clocks Increase Costs and Do Not Anticipate all Decisions that Must be Made

Shot clocks govern the land use permitting decision process. When an application is approved for placement of a wireless facility at a particular location, the applicant often has not gone through the "Miss Utility" process to determine the precise route any connections to the wireless facility must follow; and typically, the utility has not performed all make-ready work that may be required.

Some operators defer detailed, construction type engineering – including historical reviews that may be required under state or federal law – until it is determined whether the

[26] *See* 47 C.F.R. § 1.40001(c)(3)(i); *see also In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies,* WT Docket No. 13-238, *Report and Order*, 29 FCC Rcd. 12865, 12970 (Oct. 21, 2014) ("6409 Order").

facility can be placed at a particular site. Shot clocks are designed to force land use decisions within a set time; that is, to determine whether a specific facility should be allowed to be placed at a proposed location. While as part of that decision making process, a locality may evaluate the feasibility of the site requested, the actual construction may require additional permitting that is performed post-authorization. The Commission's own 6409 Orders recognize that safety issues may be addressed as part of the determination of whether an application is an appropriate "eligible facilities" request, but may also be addressed outside that process.[27] As the Commission considers whether and how shot clocks should be modified, it is important to recognize that if all permits required for construction are in place within a specified period, that will also mean that the applicant must perform all work before an application can be filed. Rather than speeding or reducing the cost of the permitting process, this is much more likely to add to deployment costs. In many cases, it will be impossible to complete permitting within the time frames that now apply to land use type permitting. Often permits will only be finalized, for example, after detailed field engineering is completed, and after pre-construction inspection (to ensure that what is being built in the field actually matches up with approved designs.)

Special reviews (for historic districts, for instance), depending upon the state and community, may occur before or after land use issues are considered, just as the previously required Section 106 historic review often occurred after land use approval, but before construction. Requiring those processes to be completed within a specified time frame is not only unnecessary, but also adds to the expense of the process.

[27] *See id.* at 12951; *see also* Afflerbach Declaration at 12-14.

The time it takes to complete these reviews are not only site-specific, but are higher for sites within the rights of way.[28] For example, a facility with battery backup power supplies that include toxic chemicals will require much more rigorous review than one that does not. A facility in an area with high fire risks may require additional permitting than one that is not. Local governments have never received complaints that these requirements are sources of delay.

The problems identified above are not simply speculative.[29] For example, the City of Portland, Oregon has learned over the first three years of its ongoing small cell pilot that batch submissions are not at all useful to City staff. Had the batch applications they received been uniform, there may have been some efficiencies gained; in reality, applications were batched by carriers not based on substantial similarity, but based on geographic location, and rarely demonstrated any consistency between applications. As a result each required a separate, individual review process, which consumed even more time than reviewing individual applications. It is not uncommon for carriers to object to being required to deploy small cells of a uniform design, arguing that each location is different; the same is true of applications for siting of those facilities. Each location is different, and bulk submission of applications does not reduce the necessity for individualized review.

Shot clocks also cannot account for the substantial delays driven by the submission of incomplete applications. The inadequacy of applications submitted, often by carriers' contractors, significantly increased the time it took Portland staff to review applications. During its small cell pilot, Portland approved sixty-six applications. Each one had initially been submitted without required information or documentation. Many applications even contained

---

[28] *See* Afflerbach Declaration at 21 (describing the enhanced burden created by applications for facilities in the public rights-of-way.)

[29] *Id.*

simple arithmetic errors in calculating the volume of equipment, necessitating top to bottom review of every aspect of every single application. Municipalities cannot and should not be held accountable for delays, and substantially increased costs, caused by the routine submission of incomplete or inaccurate applications.

Even in their current form, shot clocks can be quite stressful, particularly for small communities in or near major metropolitan areas. Gaithersburg, Maryland, for example, has four planning staff who must handle not only hundreds of ordinary applications, but also an ever-increasing volume of complex wireless applications. Modifications to the shot clocks will increase the costs associated with considering applications, and require localities to rely increasingly on outside or special contractors, whose costs must be recovered through increased fees.

C. Even Assuming It Had the Power to Do So, the Commission Should Not Interject Itself Into the Fee-Setting Process.

As noted above, localities are typically limited to recovering costs associated with the exercise of the police power.[30] However, the method for determining and assessing costs varies from community to community. In some communities, permitting costs may be set based on a community's prior experience, e.g. the aggregate costs for permitting divided by the number of permits incurred by that local government the previous year. While this theoretically means some applicants pay more than the actual costs associated with their application, it means others pay less, and all avoid the costs associated with maintaining detailed cost records. Communities that operate this way are setting permitting fees that are not unlike the regulatory fees set by the FCC – and the Commission can imagine the additional costs that would be incurred if it were

[30] *See* McQuillan, *supra* note 11.

required to identify the costs associated with every filing it considered, and to charge only the actual costs to each petitioner. Some communities do charge an hourly fee based on staff costs, and based on the costs of contractors and experts that must be retained to consider applications. Some combine these approaches, or apply different approaches to large and small projects. History has also taught us that many times permit fees collected do not result in full cost recovery, on an individual permit or aggregate basis.[31]

If the Commission dictates the methodology for cost recovery, it will be creating special cost and accounting procedures that are only applicable to wireless providers. This will not reduce costs, but will likely increase them, as communities are forced to follow what would amount to a return to the sorts of complexities that used to be involved in rate of return ratemaking. Even assuming the Commission could do this, there is no rational reason for the Commission to adopt federal rules when there are already limits on local charges embedded in state laws.[32]

D. Communities Are Responding with New Approaches

Communities are pursuing creative solutions to deal with the challenge of siting and permitting an alternative wireless network within the community's rights-of-way.[33] One possible solutions that carriers and communities have developed is that of carrier subsidized permitting personnel, or what has been described as a concierge service. While concierge services differ from city to city, they general involve funds dedicated for the specific purpose of enabling local

---

[31] *See* Cahill Declaration at 7-12.

[32] *See* McQuillin at Vol. 9 § 26:41 ("Where a permit fee is imposed pursuant to a municipality's power to regulate, the amount of the fee may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity.")

[33] *See* Afflerbach Declaration at 19-20, 22-25.

government to hire consultants or dedicate staff to a specific project to overcome staffing or expertise shortages. For example, the City of Boston's process, and the City of San Jose's agreements with AT&T, Verizon, and Mobilitie, all include concierge elements.[34] Many times these programs provide the additional assistance on an hourly basis for staff and any other resources local government may need to engage to complete review.

III. COMPENSATION COMPARED TO COST RECOVERY

What a local government may charge as compensation for use of public assets is driven by state law and state constitutional principles.[35] Local governments cannot simply give away public property for private purposes, nor can the Commission constitutionally compel the grant of access, even in those states that have adopted small cell legislation.[36] The same pricing principles that animate network deployment decisions – opportunity costs – apply in local government property compensation.[37] The record before the Commission remains devoid of examples of compensation actually serving as a barrier to deployment. If anything, the record

[34] *See, e.g.* City of San Jose Model Agreements, Document B: Funding and Reimbursement Agreement (rel. Jun. 27, 2018), *available at* https://www.fcc.gov/document/rosenworcel-announces-availability-small-cell-model-agreements.

[35] Of the twenty or so states that have recently adopted small cells in the rights of way statutes, a number capped rental rates. States that do not have small cell legislation, nevertheless have limitations on what a local government may charge for public assets, For example, in California, communities do not charge rent for use of rights-of-way by telephone companies for the placement of telephone lines, while other states have pricing schedules on what can be charged for the rights-of-way component of a small cell.

[36] *See* Smart Communities & Special Districts Reply Comments, WT Docket No. 17-79, at 47 (Jul. 17, 2017).

[37] *See* Cahill Declaration at 7-12 (describing the full scope of costs which must be included in pricing both permits and property access in the rights of way.)

shows communities that charge fair value for access to rights of way also have some of the most robust deployments.[38]

Even if it wished to do so, the Commission cannot set rates charged for access to the rights of way, much less the rates charged for access to publicly owned or controlled structures that may be useful to wireless providers. The Commission does not generally have the right to set rates for access to property – to the extent that authority is granted, through Section 224, it specifically precludes setting rates for access to municipally-owned property.[39] Section 253, as we have explained, does not give the Commission authority to set rates – at most, it permits a court to preempt a fee that is "unreasonable" (the Commission has no authority to resolve issues under Section 253(c))[40]. A rate that mimics fair market value is by definition reasonable, as we have explained.[41] Moreover, the Commission's authority under Section 253 is limited to "prohibitions" of telecommunications services.[42] It does not reach, or permit the Commission to reach, charges that may be associated with use of the rights of way to provide services that are *not* telecommunications services.

---

[38] Compensation is not always cash.. Charles Small of the City of Los Angeles described for Commission staff the City's agreement with Verizon, in which the majority of compensation is provided in the form of in-kind smart communities services which Verizon will make available using the City-owned street light poles on which their small cells are deployed. *See June 29 Ex Parte*.

[39] *See* 47 U.S.C. § 224.

[40] See 47 U.S.C. § 253(d); *see also* Smart Communities & Special Districts Wireless Comments at 55-58.

[41] *See* Reply Comments of the Smart Communities & Special Districts Coalition, WC Docket No. 17-84, WT Docket No. 17-79, at 58-59 (Jul. 17, 2017) ("Coalition Reply Comments").

[42] *See* Smart Communities & Special Districts Wireless Comments at 59-61; *see also* Coalition Reply Comments at 51-54.

IV. OPPORTUNITIES FOR COMMISSION ACTION TO ADDRESS BARRIERS TO DEPLOYMENT

The Smart Communities and Special Districts Coalition does believe that there are steps that the Commission can and should take to expedite the deployment of small cell and 5G technology nationwide. These steps include updating the Commission's RF standards that have not be addressed in this century and understanding the chilling effect Section 6409 protected growth schemes have on small cell deployments in the rights-of-way.

A. RF Emissions Standards

The Commission must update its RF emissions standards for the new millennium and address their applicability to modern and next-generation networks.[43] Smart Communities believes that such an action could remove a substantial barrier not only to deployment, but also to adoption of next generation networks. RF emissions concerns generate strong opposition to wireless deployments from concerned citizens who do not believe the current standard protects them and their children when sites are being deployed proximate to urban bedroom windows. By updating the standards, the Commission can assist in the efforts to ensure consumers are protected while arming providers and local governments with current standards to govern use the small cell in the rights-of-way deployment processes.

But perhaps more importantly, local governments are also major potential users of 5G equipment and applications, but will find it very difficult to invest in those services without updated RF standards. Opponents of wireless service may be able to highlight outdated FCC standards that are inconsistent with the latest global research on RF. Such opposition could be

[43] *See* Smart Communities & Special Districts Wireless Comments at 30.

fond and that opposition will present problems in procurement. Local governments want next-generation services, but the Commission's long silence on RF will frustrate deployment efforts.

B. Recognizing the Expansion of Facilities Under Section 6409(a)

A second action that the Commission could take to promote deployment of small cells in the rights of way is to better understand the resistance the growth patterns provided under the Commissioner 6409 (a) generate. The Commission's rules with respect to what constitutes a "substantial" change in the physical dimensions of a eligible facility under 47 U.S.C. § 1455 (Section 6409(a) of the Spectrum Act) also complicates the siting of small cells in the rights-of-way.[44] While the wireless industry has told the Commission and state legislatures that small cells are only "about the size of a pizza box,"[45] (while discounting the size of associated equipment), in reality, facilities are being deployed in the rights of way that use the sorts of antennas and involve equipment more like that installed on a macrocell.

Figure 1: T-Mobile "small cell" in Los Angeles, CA, demonstrating substantial size of small cell equipment and mandatory increases in site size required by Section 6409(a).

Communities are well aware that such sites are being installed, and that there is a real risk that approval of a "pizza box" sized facility in a residential neighborhood can be followed by a

[44] *See id.* at 27-28; *see also* Afflerbach Declaration at 14.

[45] CTIA, *What is a small cell?* (last accessed Jul. 3, 2018), https://www.ctia.org/news/what-is-a-small-cell.

request to install facilities comparable to the T-Mobile facility pictured here. We recognize that one could argue that when the Commission defined as insubstantial the addition of a six foot horizontal addition to a pole, it did not intend to allow for multiple extensions at different levels, or the addition of large radio units or antennas as pictured above. But the point is, that is not a battle localities should be forced to fight, and localities are much more likely to approve true small cell installations if those installations will remain physically small. If the Commission desires to encourage more placements in the rights of way, it needs to recognize that its definition of "substantial change" as it relates to the right of way is not sound, and that substantiality must be measured in relation to the facility that was originally approved. The sorts of absolute standards (like the 10 by 6 foot standard) embedded in the Commission's rules simply fail to take the original design limits into account in a sensible way.[46]

C. Protection of Modern Planning Processes

Finally, local governments are continuing to adapt their processes.[47] Many are shifting from using zoning to govern placement, to using planning authority. Design manuals which include clear guidelines and, in some cases, safe harbor designs, are being developed to expedite approval, while preserving a carrier's right to pursue a different model through the zoning process. For instance, the City of Myrtle Beach shared such a model with Commissioner Clyburn.[48] And the Texas state small cell bill, SB 1004, authorized local governments to adopt just such an approach, preserving an express right for localities to "adopt a design manual for the

[46] *See* 47 C.F.R. § 1.40001(b)(7).

[47] *See* Smart Communities & Special Districts Wireless Comments at 14-17.

[48] *See generally* Myrtle Beach, SC Ex Parte.

installation and construction of network nodes and new node support poles in the public right-of-way" by ordinance.[49]

Developing models – and building wireless into planning processes - may take more time up front, but expedites approval in the long run. Local governments need time, however, to develop these manuals, including by incorporating industry comment and feedback, and may further benefit from Commission participation in this process. Commission actions which would prohibit these efforts, however, would be counterproductive.

[49] *See* Tex. Local Gov't Code § 284.108(a).